NO. 42552-1

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Personal Restraint Petition of:

DARNELL McGARY,

Petitioner.

OPENING BRIEF OF THE STATE OF WASHINGTON

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I. ISSUES PRESENTED

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The Issue In A Previous PRP, Should This Petition Be Dismissed?

II. STATEMENT OF THE CASE

This case concerns two consolidated cases. The first is a personal restraint petition (PRP) originating as a petition for writ of habeas corpus filed in Pierce County Superior Court. On motion of the State, that case was transferred to this Court as a PRP on December 2, 2011. (COA No. 42871-7-II). The second is a direct appeal by McGary following his re-commitment as a sexually violent predator (SVP) pursuant to RCW 71.09.090 following a trial in August of 2011. (COA No. 42552-1-II). This Court, on its own initiative, consolidated the two cases; the Clerk has ruled that one response be filed in response to both. Clerk's Ruling dated April 10, 2012.

A. Facts Related To Direct Appeal Of August, 2011 Commitment

The State accepts Appellant McGary's statement of the case except as otherwise noted below.

Darnell McGary has been convicted of sexually violent offenses involving the rape of three women. On the morning of July 24, 1987, Cynthia Franklin, 28, was leaving her parents' home in Spanaway, Washington to go to work.[1] As she got into her car, a stranger,

[1] The testimony of Ms. Franklin was presented to the jury by video deposition, a transcript of which was entered as Ex. 67.

subsequently identified as McGary, grabbed her, put a knife to her throat, and said, "you're dead, bitch....I'm going to kill you." Ex. 67 at 9. Terrified, crying, and thinking she was going to die, Cindy struggled with McGary over her car keys, cutting her hands. *Id.* at 11. When she eventually stopped struggling, McGary grabbed her and took her into her house. *Id.* at 12. Cindy continued to struggle; she testified that there was blood on the walls in the hallway from her bloodied hands. *Id.* McGary forced her into her bedroom where, while telling her that she was "scum" and "a nasty bitch," he told her to take off her clothes. *Id.* at 12-13. After instructing her to lie on the floor, McGary raped her. *Id.* at 14. After he had raped her, McGary told Cindy to take a shower. *Id.* at 15. She locked herself in the bathroom, and could hear him going through the house. After he left, she reported the incident to the police, and later identified McGary in a photo lineup. *Id.* at 19. Although she had never seen McGary before, Cindy testified that she believed that he had been at her house before the morning of the rape, because "his cigarette butts were found outside almost every window in my house." *Id.* at 20. McGary was convicted of Rape in the First Degree and Burglary in the First Degree on the basis of this incident. Exs. 7, 9.

In the early morning hours of April 16, 1988, 18-year-old Jennifer Staker was alone in her home, where she lived with her mother and her

grandparents. Ex. 71 at 7-8. She had returned from work at roughly 2:30 AM. *Id.* at 8. While she was watching television, she heard a knock at the door, and a man whom she did not recognize told her through the peephole that her car had rolled across the street where it had been parked. *Id.* at 9. She went out to retrieve the car and, when she had re-parked it, a man, later identified as McGary, approached her in her car and attacked her. *Id.* at 11. He grabbed her from behind and, putting his other hand over her mouth, pulled her out of the car. *Id.*. He guided her toward her house, telling her that he was not going to hurt her and that he just wanted her VCR. *Id.* at 12. Jennifer testified that she recalls McGary telling her not to cry, and at one point Jennifer fainted briefly. *Id.* He entered her house, turned out the lights, and told her not to look at his face. *Id.* at 13. As he went around the house, Jennifer considered darting out the back door, when McGary said, "Don't even think about it. I have the means to kill you." *Id.* at 16. After being unable to find a closet to put her in, he ordered her into the bathroom. *Id.* After she told him that she had no jewelry, McGary said, "[w]ell, we're just going to have a little sex, and then I'll go. Okay?" to which Jennifer responded "no." *Id.* at 17. He led her to the bedroom, where he wrapped her hand around his penis, stroking himself until he ejaculated. *Id.* at 18. He then ripped a phone out of the wall, and went through Jennifer's purse, taking roughly $50. *Id.* at 20. After

Jennifer called her mother, crying and hysterical. *Id.* at 22. She reported the incident to the police and, some months later, Jennifer identified McGary in a photo montage. *Id.* at 25. McGary was ultimately convicted of Burglary in the Second Degree and Indecent Liberties based on this incident. Exs. 4, 6.

In the early morning hours of May 6, 1988, Anita Harkness, 18, was in her second floor apartment in Parkland, Washington, where she lived alone. Ex. 75 at 7. After having worked the late shift at Kentucky Fried Chicken, she had gone to sleep around midnight. *Id.* at 8. She heard a noise, and got out of bed to investigate. *Id.* at 8-9. She saw a man standing at the end of her apartment near the sliding glass door to the balcony. *Id.* at 9. She immediately began screaming. *Id.*. McGary ran toward her, slapped his hand over her mouth, and told her that he had a knife and would kill her if she didn't stop screaming. *Id.* at 10. Initially, McGary told Anita to lie on her bed, face down, telling her he would not hurt her and only intended to rob her. *Id.* at 11. He then pulled the covers over her head while he rummaged around her apartment. *Id.* He then returned to her, told her to roll over and, as she did, she realized that he was now naked. *Id.* at 11-12. She began to scream again, and as she did, he put a pillow over her face, again telling her to stop screaming, threatening to kill her if she did not. *Id.* at 12. As he attempted to put his

penis inside of her, she told him that it hurt, reminded him that he had promised not to hurt her, and begged him to stop. *Id.* at 13. Unable to maintain an erection, he withdrew, forced her blindfolded into her closet and asked for her purse and the keys to her car. *Id.* at 14-18. As soon as McGary left, Anita went to her parents' home and called the police. *Id.* at 22. McGary was subsequently convicted of Burglary in the First Degree and Rape in the First Degree for this offense. Exs. 1, 3.

In 1998, Prior to his release from prison for these offenses, the State petitioned for his commitment as a sexually violent predator (SVP). CP at 7; *State v. McGary,* 128 Wn. App. 467, 470, 116 P.3d 415 (2005).

McGary suffers from schizophrenia. While awaiting his SVP trial, McGary's mental condition deteriorated because he refused to take his psychotropic medications. *McGary,* 128 Wn. App. at 471. The State dismissed the SVP petition against McGary without prejudice and he was involuntarily committed to Western State Hospital (WSH) pursuant to RCW 71.05 so doctors there could treat and stabilize his schizophrenia. *Id.* WSH staff were successful in stabilizing McGary's schizophrenia and the State re-filed the SVP petition against him. *Id.* at 472; CP at 1-22.

B. Facts Related To Personal Restraint Petition

In February of 2011—that is, prior to the trial at issue in his direct appeal-- McGary filed a habeas corpus petition in superior court pursuant

to RCW 7.36. Three months later, McGary was granted a new trial on the question of whether he continued to meet commitment criteria. The matter went to trial, and a unanimous jury re-committed him in August of 2011. CP at 105. He successfully served the superintendent of the Special Commitment Center (SCC) with his petition in September of 2011, and then filed a Motion for Summary Judgment on the habeas petition. The State responded, asking, *inter alia,* that the trial court transfer the petition to this Court for consideration as a personal restraint petition (PRP). That motion was granted, the case transferred to this Court and, by Ruling dated February 8, 2012, the case was consolidated with the direct appeal of the commitment order that was entered following McGary's August, 2011 re-commitment trial.

III. ARGUMENT

McGary's commitment should be affirmed and his PRP dismissed. First, the trial court acted within its discretion when it precluded McGary's expert from testifying regarding an untested tool he had created in order to assess sex offender risk. Second, even if there was trial court error, McGary, by never making a proper offer of proof, has not preserved that error and cannot show prejudice. Nor did the State's attorneys' cross examination or closing remarks constitute prosecutorial conduct. There is no error below, cumulative or otherwise, and the commitment should be

affirmed. Likewise, McGary's PRP should be dismissed as moot, untimely, successive or, in the alternative, as raising issues that could and should have been raised in earlier personal restraint petitions.

A. The Trial Court Did Not Abuse Its Discretion By Excluding Testimony Related To The MATS-1

McGary argues that the trial court abused its discretion by excluding testimony by McGary's expert, Dr. Richard Wollert, related to the "MATS-1," a tool, described as an actuarial instrument, developed by Dr. Wollert and two of his colleagues. App. Br. at 23-32. This argument lacks merit. Actuarial risk assessment "evaluates a limited set of predictors and then combines these variables using a predetermined, numerical weighting system to determine future risk of reoffense[.]" *In re Detention of Thorell*, 149 Wn.2d 724, 753, 756, 72 P.3d 708. Evidence about actuarial risk assessment is admissible in Washington SVP cases and elsewhere because the methods and procedures used to construct such instruments are well accepted in the scientific community. *Id.*, 149 Wn.2d at 753. The admissibility of such instruments is assessed under ER 702[2]

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[2] ER 702 provides as follows:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

and 703.[3] *Id.* at 756. McGary was unable to demonstrate that the MATS-1 met basic threshold requirements for admissible evidence under ER 703. As such, the testimony was properly excluded. Even if there was trial court error, McGary has not shown prejudice, in that there is no indication that McGary's assessed risk would have been any lower based on MATS-1, and as such it is impossible to assess how this ruling affected Dr. Wollert's testimony.

1. Facts Relating To Exclusion of MATS-1

Rather than use any of the well-established instruments considered in prior cases, Dr. Wollert, in preparation for McGary's trial, scored him on the MATS-1. 7RP at 769. When Dr. Wollert was deposed prior to trial, he had conceded that the MATS-1 was not commonly used by SVP evaluators:

> Q. But is the MATS-1 commonly used in the field of SVP evaluation?
> A. No. As I said, this has not been published yet. It's been reported and it's been accepted for publication.

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[3] ER 703 provides as follows:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

CP at 195. *See also* 7RP at 770; 850. Shortly before trial, as a result of a subsequent deposition of Dr. Wollert in an unrelated case, the State learned that the article related to the MATS-1 had been published and that Dr. Wollert "knows of some experts who are using this." 7RP at 770. In anticipation of his testimony in this case, the State then moved in limine pursuant to ER 703 to prevent Dr. Wollert from testifying about MATS-1.[4]

In response to the State's motion and upon voir dire prior to his trial testimony, Dr. Wollert testified that he knew of 6 people who provided expert testimony, other than himself, who used the MATS-1. 7RP at 846-50. When questioned as to whether each of these experts testified exclusively on behalf of the defense in sex predator cases, he indicated that he did not know, but stated that several had been present at a conference of the Sex Offender Crime Defense Association conference weekend before trial. 7RP at 846-851. He did not know how frequently or in how many cases any of these experts had used the MATS-1. 7RP at 846-50. Nor did he know whether, of those 6 known to have used the instrument on at least one occasion, any had used it in conjunction with

[4] McGary argues that the State, by contesting Dr. Wollert's use of MATS-1, was essentially making an argument under *Frye v. United States,* 293 F. 1013, 1014 (D.C.Cir.1923). App. Br. at 30-31. This is simply incorrect. The State made clear, both in its briefing and in oral argument that actuarial instruments were not subject to *Frye* pursuant to *Thorell.* CP at 195; 7RP at 775.

any other widely-used actuarial instrument. 7RP at 859. In argument, McGary's trial counsel conceded that use of the instrument "isn't common." 7RP at 861.

In considering the State's motion, the trial court also had before it various court orders from other trial courts relating to Dr. Wollert and his "history of unreasonably relying on his own novel methods." CP at 195. The State presented evidence that courts across Washington State had entered specific findings rejecting his methods and opinions because they are not commonly accepted. The Hon. Michael E. Schwab of the Yakima County Superior Court, for example, had entered findings stating that "Dr. Wollert's methods of assessing the impact of age on recidivism are not generally accepted in the community of experts who conduct SVP evaluations" and that his "advocacy of" a particular statistical formula to the various risk assessment tools regarding the assessment of older, high risk offenders "is not generally accepted by the scientific community. CP at 204. Four years later, the Honorable T.W. Small of the Chelan County Superior Court found that Dr. Wollert's opinions were "biased and not credible," and enumerated 16 bases for that finding, including a finding that Dr. Wollert "disregarded methods of evaluation that are generally accepted in the psychological community. " CP at 208, No. 26(p). The findings state that Dr. Wollert's criticism of the State's psychologists was

"disingenuous" in light of his "income testifying exclusively for Respondents," (CP at 208, No. 26(e)) and that his opinions "lacked objectivity due to his close association with the defense association and defense bar." CP at 208, No. 26(f).

Not long after entry of Judge Small's findings in 2009, the Honorable Linda C.J. Lee of the Pierce County Superior Court entered findings characterizing Dr. Wollert's opinion as "suspect" (CP at 213, No. 35) and noting that, while the court "found Dr. Wollert to be a very passionate person about his own theories and opinions..." his opinions and testimony "were inconsistent, contradictory, generalized and conclusory." CP at 213, No. 36. Judge Lee went on to make 14 specific findings illustrating that determination, closing with the observation that, "based on the testimony presented to this Court, Dr. Wollert's crusade to convince others to adopt his theories should be best fought with his colleagues in their professional forums first, and not openly in the courts, which, in this Court's opinion, damages his credibility." CP at 213-15, Nos. 36 through 48.

The trial court in this case, after considering all of this information, granted the State's motion to preclude testimony related to the MATS-1. CP at 217-218; 7RP at 867.

2. The Trial Court's Decision Was A Proper Exercise Of Discretion

Expert testimony is admissible if the witness's expertise is supported by the evidence, his opinion is based on material reasonably relied on in his professional community, and his testimony is helpful to the trier of fact. *Deep Water Brewing, LLC v. Fairway Resources Ltd.* (2009) 152 Wn. App. 229, 215 P.3d 990, *review den.* 168 Wn.2d 1024, 230 P.3d 1038 citing *Reese v. Stroh,* 128 Wn. 2d 300, 306, 907 P.2d 282 (1995); ER 702; 703. The court's trial court's decision to admit expert testimony under applicable rules of evidence is reviewed for abuse of discretion. *State v. Roberts,* 142 Wn.2d 471, 14 P.3d 713 (2000); see also *Moore v. Harley-Davidson Motor Co. Group, Inc.* 158 Wn. App. 407, 417, 241 P.3d 808 (2010). A court abuses its discretion when its decision is based on untenable grounds or is manifestly unreasonable or arbitrary. *State ex rel. Carroll v. Junker,* 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A trial court decision may be affirmed on any basis regardless of whether that basis was considered or relied on by the trial court. RAP 2.5(a); *State v. Cervantes*, 273 P.3d 484, 487 (2012).

Here, the trial court based its ruling on ER 703.[5] The trial court's ruling was proper because McGary could neither demonstrate that MATS-1 was relied upon by other experts in the field, or that it was used for purposes other than litigation. Although the trial court did not rely on ER 702 for its decision, exclusion on that basis would have been proper as well, in that consideration of this "instrument" would not have been helpful to the trier of fact.

a. The Trial Did Not Abuse Its Discretion In Precluding Testimony Related To MATS-1 Under ER 703

Pursuant to ER 703, the "facts or data" upon which an expert bases an opinion need not be admissible in evidence, if they are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." In *State v. Nation*, 110 Wn. App. 651, 41 P.3d 1204 (2002), Division III adopted the framework for admitting expert testimony under ER 703 set forth by this Court in *State v. Ecklund,* 30 Wn. App. 313, 318-19, 633 P.2d 933 (1981).

> First, the judge should find the underlying data are of a kind reasonably relied upon by experts in the particular field in reaching conclusions. And second, since the rule is concerned with trustworthiness of the resulting opinion, the judge should not allow the opinion if (1) the expert can

[5] McGary erroneously indicates, in footnote 2, that the court based this ruling on ER 704. Elsewhere, he correctly states that this ruling was based on ER 703. App. Br. at 23.

> show only that he customarily relies upon such material, and (2) the data are relied upon only in preparing for litigation. Thus, as stated in the Comment to ER 703, "The expert must establish that he as well as others would act upon the information for purposes other than testifying in a lawsuit."

Nation, 110 Wn. App. at 662-663, citing *Ecklund,* 30 Wn. App. at 318 [internal citations omitted]. The reliance of the expert must be customary and reasonable. Commenting on the court's decision in *Nation,* Tegland notes,"[i]t is not sufficient to show that the particular expert in question customarily relies upon such material. The proponent of the testimony must show that *experts in the witness's field, in general, reasonably rely upon such material in their own work*; i.e. for purposes other than litigation." Tegland, Karl, *Courtroom Handbook on Washington Evidence*, 2011-2012 Edition (emphasis added).

Applying this analysis to Dr. Wollert's testimony related to the MATS-1, it is clear that the trial judge did not abuse his discretion is excluding the testimony. As noted above, Dr. Wollert testified on voir dire that he knew of only six people other than himself who provided expert testimony utilizing the MATS-1. 7RP at 846-50. When questioned as to whether each of these experts testified exclusively on behalf of the defense, he indicated that he did not know, but stated that several had been present at a conference of the Sex Offender Crime Defense Association

conference the weekend before trial. 7RP at 846-851. He did not know how frequently or in how many cases any of these experts had used the MATS-1. 7RP at 846-50. Nor did he know whether, of those six known to have used the instrument on at least one occasion, any had used it in conjunction with any other widely-used actuarial instrument. 7RP at 859. In argument, McGary's trial counsel conceded that use of the instrument "isn't common." 7RP at 861.

It was largely this failure to have gained acceptance in the applicable professional community that led the court to conclude that MATS-1 was not "of a type of test reasonably relied upon by experts in the field" and as such did not meet the standards of Rule 703. 7RP at 867. Nor did McGary present any evidence whatsoever that anyone—even Dr. Wollert—used MATS-1 for any purpose other than litigation. *See Nation*, 110 Wn. App. at 662-663.

McGary argues that "Since *Thorell,* Washington courts have consistently held that all sorts of actuarial tables are admissible under *Fry* [sic] and ER 702." App. Br. at 31. The cases he cites, however, all of which deal with well-established actuarial instruments widely used by other professionals in the field, do little to support this proposition.[6] Of

[6] Although the *Thorell* Court does not specify which specific actuarial instruments are at issue in the five consolidated cases, it appears that three instruments (MnSOST, RRASOR, and the VRAG) had been challenged in one of those cases (*In re*

the cases cited, only one addresses a less widely-used instrument. *In re Robinson*, 135 Wn. App.772, 146 P.3d 451 (2006). There, Robinson challenged the Screening Scale for Pedophilic Interests (SSPI), arguing that it was novel scientific evidence that must meet *Frye*. *Id.*, 135 Wa. App. at 785. In holding that the SSPI was an actuarial instrument and hence came within the purview of *Thorell,* the court noted that Robinson's own expert agreed that the SSPI was an actuarial instrument. *Id.* at 787. This is clearly distinguishable from this case, where McGary was attempting to present testimony based on the invention of a defense expert whose bias has been frequently commented on, and where only six others in the universe are known to have ever used that invention.

b. ER 702 Provides An Alternate Basis For The Trial Court's Decision

Although the trial court's ruling was based on ER 703, ER 702 provides an alternate basis for exclusion. Expert testimony in the form of an opinion is admissible under ER 702 if "'(1) the witness qualifies as an expert, (2) the opinion is based upon an explanatory theory generally accepted in the scientific community, and (3) the expert testimony would be helpful to the trier of fact.' " *State v. Swan,* 114 Wn.2d 613, 655, 790 P.2d 610 (1990)(quoting *State v. Allery,* 101 Wn.2d 591, 596, 682 P.2d

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Strauss, 106 Wn. App. 1, 20 P.3d 1022 (2001) and one, the VRAG, in another. *In re Charles Lee Johnson*, 106 Wn. App. 1015, WL 508371 (2001).

312 (1984)). Even if generally accepted in principle, proffered scientific evidence is inadmissible under ER 702 unless it is helpful to the trier of fact under the particular facts of the specific case in which the evidence is sought to be admitted. *State v. Greene*, 139 Wn.2d 64, 73, 984 P.2d 1024 (1999). Admissibility of expert testimony under ER 702 is also within the trial court's discretion. *State v. Cheatam,* 150 Wn.2d 626, 645, 81 P.3d 830(2003). In making its determination, the court's conclusions will depend on (1) the court's evaluation of the state of knowledge presently existing about the subject of the proposed testimony and (2) on the court's appraisal of the facts of the case. *State v. Riker,* 123 Wn.2d 351, 364, 869 P.2d 43 (1994) (quoting *State v. Reynolds,* 235 Neb. 662, 683, 457 N.W.2d 405, 419 (1990)).

Here, exclusion of testimony related to MATS-1 was proper under ER 702. In considering the admissibility of MATS-1, the court was required to consider "the facts of the case," which included the fact that 1) the instrument had been developed by an expert exclusively associated with the defense; 2) the only other persons known to have used this instrument, besides Dr. Wollert, were 6 psychologists also known to be associated with the defense in SVP cases; 3) The instrument's author had a history of bias in SVP cases so egregious that three different trial courts

over a period of 4 years had entered specific and lengthy findings commenting on his lack of credibility. As noted by this Court,

> It is the court's duty to act as a gatekeeper, to admit techniques accepted in the relevant scientific community even when they are novel to the court, but to exclude techniques that are novel both to the court and the relevant scientific community. The courtroom is not the appropriate venue for scientists with reasonable differences of opinion to resolve their professional disputes.

Moore, 158 Wn. App. at 418 (internal citations omitted). Under these circumstances, the trial court properly exercised its discretion in excluding any testimony related to the MATS-1.

3. Even If Trial Court Abused Its Discretion In Precluding Testimony Related To The MATS-1, McGary Has Not Demonstrated Prejudice

The trial court did not abuse its discretion in precluding Dr. Wollert from testifying regarding the results of the MATS-1. Even if it did, there was no prejudice. An error in the admission or exclusion of evidence that is harmless, i.e., an error that poses no substantial likelihood that it affected the verdict, is not grounds for reversal. *Carnation Co. v. Hill,* 115 Wn.2d 184, 186, 796 P.2d 416 (1990). Here, there is no evidence that exclusion of testimony relating to the MATS-1 affected the verdict in any way. First, McGary never established, through an offer of proof or any other means, what Dr. Wollert's testimony regarding his risk

assessment of McGary using the MATS-1 would have been. By failing to make an offer of proof, McGary failed to preserve error. Second, McGary cannot demonstrate that he was prejudiced by the court's decision precluding testimony based on the MATS-1.

Pursuant to ER 103(a)(2), error may not be predicated upon a ruling which excludes evidence unless the substance of the evidence was "made known to the court by offer or was apparent from the context within which questions were asked." "An offer of proof serves three purposes: it informs the court of the legal theory under which the offered evidence is admissible; it informs the judge of the specific nature of the offered evidence so that the court can assess its admissibility; and it creates a record adequate for review." *State v. Ray,* 116 Wn.2d 531, 538, 806 P.2d 1220 (1991). Here, the State moved in limine for an order stating "precluding Dr. Wollert from relying on or testifying about the MATS-1." CP at 197. The substance of the evidence—McGary's score on an alternative instrument created by Dr. Wollert—was never made known to the trial court, nor is it "apparent from the context." Although it is clear that the trial court conceptualized the voir dire testimony of Dr. Wollert as intended as an offer of proof (8RP at 780, 823), the entirety of the testimony related to the development of various well-established actuarial instruments as well as the creation of the MATS-1, and no

testimony was ever offered as to what McGary's score would have been on the MATS-1 or how that score affected Dr. Wollert's overall assessment. 8RP at 825-860. As such, there is no way to know whether the risk assessment based on the MATS-1 was in fact any different than that assigned based on other well-established instruments to which Dr. Wollert ultimately testified at trial, and it is impossible to assess prejudice.

McGary cannot demonstrate prejudice because he cannot demonstrate how testimony based on the MATS-1 would have been any different than the testimony that actually came in at trial. Indeed, it is difficult to imagine what difference testimony regarding the MATS-1 could have made. Dr. Wollert was able to testify, using well-established actuarial instruments such as the Static-99 and its more recent iterations, the Static-99R and Static-2002R, that McGary was not "likely" to reoffend. 7RP at 919; 8RP at 980. Dr. Wollert testified that different evaluators had, over the years, assigned McGary scores between 4 and 7 on the Static-99 (7RP at 905, 921-22; 8RP 972-73)[7] and that, using one of the tables generated by the authors of that instrument, the maximum percentage associated with the high score on the Static-99R given by

[7] This difference depends in large part on how the 1992 assault on a fellow inmate was scored in order to determine whether McGary had ever had a male victim. 7RP at 929; 8RP at 972-73; 974.

Dr. Tucker—a 7—would correlate to a "moderately high" recidivism rate of only 26.5 percent.[8] 8RP at 974. That rate, Dr. Wollert testified, would drop to 14.5 percent for those with a score of five, and to 8.3 percent for a score of 4. 8RP at 975. In closing, when reviewing the testimony related to the actuarial instruments, McGary argued that the scores on the Static fell within the mid- to- high range and never exceeded 22.1 percent. 8RP at 1169. Referring to Dr. Tucker's scoring of another well-established instrument, the MnSOST-R, McGary argued in closing that the score assigned by Dr. Tucker would result in an assessed risk of no more than 44 percent. 8RP at 1169. Thus even without reference to the MATS-1, McGary was able to argue that his risk fell well below the "more likely than not" threshold required by law. McGary has not demonstrated that the fact that Dr. Wollert was precluded from offering (unknown proposed) testimony regarding the (unknown) score on an additional instrument known to be used by only 7 people in the sex predator universe prejudiced his case in any way.

B. The Conduct Of The State's Attorneys Did Not Deprive McGary Of A Fair Trial

McGary argues that he was deprived of a fair trial as a result of the

[8] Dr. Tucker, in contrast, testified that a score of 7 on the Static-99R would result in a 37.9 percent likelihood of sexual reoffense in 5 years, and a 48.6 percent likelihood within 10 years. 5RP at 491.

misconduct of the State's attorneys. App. Br. at 33-37. Specifically, he argues that the State improperly cross-examined Dr. Wollert about the fact that he had only scored certain actuarial instruments the night before he testified, and that this conduct "constituted flagrant and ill-intentioned misconduct because the State's Attorney is [sic] misrepresenting the facts to the jury." App. Br. at 35.

At trial, McGary did not object to any of the conduct now identified as "flagrant and ill-intentioned," and as such has waived this argument. In order to preserve error for consideration on appeal, the general rule is that the alleged error must be called to the trial court's attention at a time that will afford the court an opportunity to correct it. *State v. Wiley,* 26 Wn. App. 422, 613 P.2d 549 (1980). *See also* RAP 2.5(a). As our Supreme Court has stated,

> Under most circumstances, we are simply unwilling to permit a defendant to go to trial before a trier of fact acceptable to him, speculate on the outcome and after receiving an adverse result, claim error for the first time on appeal which, assuming it exists, could have been cured or otherwise ameliorated by the trial court.

State v. Wicke, 91 Wn.2d 638, 642-43, 591 P.2d 452 (1979). McGary appears to attempt to avoid this result by claiming that his right to a "fair trial" was violated, thus suggesting a due process argument. His argument is an example of "a trend that is troublesome—the 'constitutionalization'

of most assignments of error in criminal cases." *State v. Turnipseed*, 162 Wn. App. 60, 72, 255 P.3d 843 (2011) (Sweeney, J. concurring). This half-hearted claim does not rise to the level of a showing of "manifest error affecting a constitutional right" under RAP 2.5(a)(3) and this Court should deny review of this issue.

Even if this Court considers this argument, it is without merit. Because McGary did not object at trial, he "must demonstrate that the remark was so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Harris*, ___ Wn. App. ___, 272 P.3d 299, 309 (2012). McGary argues that a curative instruction would not have been of use, because "the damage to the expert's credibility could not be undone by an instruction." App. Br. at 37. This conclusory statement is unsupported by any reference to the record or other argument, and indeed, it does not appear to be correct. McGary points to three examples in which the State, during cross examination of Dr. Wollert, referred to his late scoring of various instruments. App. Br. at 35. No objection was raised to any of these questions, despite the fact that McGary, having witnessed the State first question Dr. Wollert as to his late scoring of the PCLR (8RP at 1002), might reasonably have anticipated the same issue would be raised

with regard to the actuarial instruments Dr. Wollert had scored the night before as well.

Nor is McGary's argument that the State "misrepresented" the facts to the jury well taken. McGary argues that "[t]he State's Attorney knew what the jury did not—that it is [sic] the State's motion to exclude Dr. Wollert's testimony about the MATS-1, which was made on the eve of his testimony, that necessitated the additional testing and the timing of it." App. Br. at 35.

This argument fails for two reasons. First, nowhere does McGary demonstrate that the state "knew" that the exclusion of the MATS-1 "necessitated the additional testing and the timing of it." All the State's attorneys "knew" is that they were hearing about this scoring for the first time when Dr. Wollert took the stand. Second, there is no evidence that this late scoring was in fact "necessitated" by the exclusion of the MATS-1. Dr. Wollert could quite easily have scored the various well-established actuarial instruments generally used in these cases at the time he evaluated McGary, and then simply explained during his deposition why he did or did not agree with the scores achieved or their implications for McGary's risk. This is particularly well illustrated by Dr. Wollert's testimony regarding the PCLR. The PCLR is not an actuarial tool; it is an instrument used to measure psychopathy. 5RP at 507; 7RP at 934. Dr. Wollert

testified that, although he had "looked at" the PCLR when he initially evaluated McGary more than two years earlier, he did not actually score it until the day before he testified. 8RP at 934. Given this fact, the term "sandbagged" seems entirely appropriate.

There was no dispute that Dr. Wollert, after having had the case for over two years, waited until the night before he testified to score certain well-established actuarial instruments and the PCLR. McGary, through his expert, could have presented evidence of his risk to reoffend based on some combination of well-established actuarial tools, and could have added to that analysis the results obtained by using the MATS-1. Instead he chose, as a matter of trial strategy, to put all of his evidentiary eggs into one dubious basket—a new device used by virtually no one and invented by a defense expert with an established reputation for bias. That the State pursued a line of questioning that pointed out Dr. Wollert's eleventh-hour decision to score established instruments he could easily have scored much earlier does not amount to misconduct, flagrant or otherwise.

McGary also argues that the State's attorney's reference to having been "sandbagged" by Dr. Wollert constitutes an emotional appeal to the jury, and flagrant misconduct analogous to that disallowed by the State Supreme Court in *State v. Belgarde*, 110 Wn. 2d 504, 507-08, 755 P.2d 174 (1988). App. Br. at 36. This comparison is absurd. In *Belgarde,* the

prosecutor, based in part on his own recollection of Wounded Knee, argued to the jury that the defendant was "strong in" a group which the prosecutor describes as "a deadly group of madmen" that "kill indiscriminately," and likening the American Indian movement members to "Kaddafi" and "Sean Finn" of the IRA. *Id.* While it is not difficult to see how the language at issue in *Belgarde* constitutes an improper emotional appeal to the jury, the use of the term "sandbagged" is scarcely inflammatory, and in fact seems to accurately describe the facts of the case.

C. McGary Received A Fair Trial

Finally, McGary argues that cumulative error deprived him of his of his right to a fair trial. McGary does not even attempt to show how this might be true. McGary has shown no error in his trial, cumulative or otherwise.

D. McGary's PRP Should Be Dismissed

McGary appears to make four arguments in his PRP: 1) that his 2004 commitment is invalid because, since his initial commitment, staff at the SCC have "burdened" him with a diagnosis of diagnosis of Paraphilia NOS: Nonconsent, a diagnosis to which he did not stipulate in his 2004 Stipulation (Pet. at 3); 2) that the diagnosis of Paraphilia NOS: Nonconsent "has been found not to exist" and hence cannot form the basis

for his commitment. (Pet. at 3-4); 3) that he no longer suffers from an Antisocial Personality Disorder, the condition to which he did in fact stipulate; and 4) that he is entitled to release based on the 2010 report of the SCC stating that he no longer meets the criteria for commitment. Pet. at 6. McGary also states, without elaboration, that he "has received ineffective assistance of counsel in some" of his prior cases. Pet. at 2.

This Court should dismiss McGary's Petition. First, it is moot: All of McGary's arguments flow from the stipulation upon which his original 2004 commitment was based. Both that commitment and the stipulation upon which it was based have now been superseded by the Order of Commitment entered following his August, 2011 trial that is the subject of the first portion of this consolidated appeal. This Court cannot grant him relief on the basis of that earlier commitment and as such, his arguments are moot. Second, McGary's Petition is untimely. Third, it raises issues previously raised and rejected by the appellate courts. Finally, even if this Court finds that McGary has not raised those issues before, he provides no basis for not having done so in previous collateral attacks of his 2004 commitment. McGary's PRP should be dismissed.

1. McGary's PRP Should Be Dismissed As Moot

The central underlying factual premise of McGary's habeas petition is that he is being held on the basis of his initial Stipulation to

Commitment. While this might have been accurate at the time of his Petition's filing in February of 2011, it is no longer the case. McGary received a new trial pursuant to RCW 71.09.090(2) in August of 2011 based on his 2010 Annual Review. The jury in that case heard extensive testimony related to the diagnoses currently assigned McGary by the State's expert, Dr. Tucker. 5RP at 398-419; 5RP at 447- 6RP at 648 *passim*; 8RP at 1074-1076; 1083. The jury also heard Dr. Wollert's criticism of those diagnoses, including his criticism of the diagnosis of Paraphilia Not Otherwise Specified: Rape. 8RP at 981-1016. Following trial, a unanimous jury determined that McGary continued to meet commitment criteria. CP at 105. McGary is no longer in custody on the basis for the initial 2004 order of commitment, and arguments related to the propriety of that commitment are moot. Likewise, his argument that he is entitled to release on the basis of the 2010 annual review is also moot, in that he has already received a new trial on the basis of that report. *See also* RAP 16.4(d).

2. McGary's PRP Should Be Dismissed As Untimely

An additional basis for dismissal of McGary's PRP is that it is not timely, having been filed almost five years after his commitment became final. Pursuant to *In re Turay,* 150 Wn.2d 71, 74 P.3d 1194(2003) McGary's PRP is subject to the one-year time limitation allowed under

RCW 10.73.090. 150 Wn.2d at 79. This Court affirmed his 2004 commitment in 2005 (*In re Detention of McGary*, 128 Wn. App. 467, 116 P.3d 415(2005)) and that decision became final in 2006 when the Supreme Court denied his petition for review. *In re Detention of McGary*, 156 Wn.2d 1029, 133 P.3d 473 (2006). Because he filed his Petition for Writ of Habeas Corpus pursuant to RCW 7.36 in February of 2011, almost five years later, it is untimely and should not be considered by this Court.

3. McGary's PRP Should Be Dismissed As A Successive Petition

Pursuant to RAP 16.4(d), "no more than one petition for similar relief on behalf of the same petitioner will be entertained without good cause shown." A successive petition seeks "similar relief" if it either renews claims already "previously heard and determined" on the merits or raises "new" issues in violation of the abuse of the writ doctrine. *In re Greening*, 14 Wn. 2d 687, 9 P.3d 206 (2002). In his PRP, McGary charges that he is being improperly held under a diagnosis that was not the basis of his original commitment. This is, however, essentially the same claim made in a previous PRP filed in 2004 in WSSC No. 76327-5. *See* Attachment A. There, McGary complained that the State was violating the order of Commitment by treating him as a "paraphile" as opposed to someone suffering from Anti-Social Personality Disorder. *Id.* at 4. He

claimed that the State was confining him in the absence of any disorder over which the trial court had jurisdiction, and that they were confining him on the basis of a condition that was not in the stipulation. PRP at 4. This petition was initially filed in the Washington State Supreme Court under Cause No. 76327-5. After briefing had been submitted, the case appears to have been transferred to this Court. COA No. 32902-6. After an order dismissing the petition was entered by Chief Judge Dean Morgan on July 19, 2005 (Attachment B), McGary again sought review by the Supreme Court, and the case was assigned a new cause number, WSSC No. 76327-5. A Ruling Denying Review was entered on October 10, 2005. *See* Attachment C. In this Ruling, the Commissioner notes that "The Acting Chief Judge determined that the materials Mr. McGary presented fail to show that the State violated its stipulation." Attachment B at 2. McGary's previous request for similar relief—that is, release based on the State's insistence upon treating him as someone suffering from a Paraphilia rather than simply a personality disorder--has been rejected on the merits. Because McGary now makes what is essentially the same claim, this petition should be dismissed as successive.

4. If This Court Determines McGary's Claims Have Not Previously Been Heard And Determined, McGary's PRP Should Be Dismissed Because McGary Did Not Raise The Claim He Makes Herein In His Earlier PRP, Although He Could Have Done So

In the event that this Court does not find that the claims presented in his current petition are essentially the same as those presented in his PRP filed in 2004, this PRP should be dismissed because McGary did not raise this claim despite the fact that it was available to him and he could have done so.

The allegations contained in McGary's Petition make clear that the grounds for McGary's current claim—that is, that the State has improperly assigned him and relied upon a diagnosis of Paraphilia NOS—were available to him prior to the filing of his previous PRPs. McGary argues, for example, that, "***in the annual reviews from 2004 to the currently addressed review*** under RCW 71.09.070 petitioner has been burdened with the diagnosis of Paraphilia NOS (non-consent) in violation of the stipulation agreement." Pet. at 3 (emphasis added).

RCW 10.73.140 states:

> [i]f a person has previously filed a petition for personal restraint, the court of appeals will not consider the petition unless the person certifies that he or she has not filed a previous petition on similar grounds, and shows good cause why the petitioner did not raise the new grounds in the previous petition.... If upon review, the court of appeals finds that the petitioner has previously raised the same

> grounds for review, or that the petitioner has failed to show good cause why the ground was not raised earlier, the court of appeals shall dismiss the petition on its own motion without requiring the state to respond to the petition.

McGary has not submitted to this Court the certification required by RCW 10.73.140. Nor, assuming this Court is not persuaded that he has in fact already raised these claims, has he shown good cause why he failed to raise this claim in his earlier PRPs. As a result, this Court should dismiss the current PRP.

IV. CONCLUSION

For the reasons stated above, this Court should affirm the Order of Commitment and dismiss McGary's Personal Restraint Petition.

RESPECTFULLY SUBMITTED May 17, 2012.

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ATTACHMENT A

(1)

Mr. Darnell McGary
SCTF McNeil
P.O Box 88450
Steilacoom Wa, 98388

IN THE STATE SUPREME COURT
STATE OF WASHINGTON

In re the personal restraint of	Petition No. 76327-5
Mr. Darnell McGary	Pierce County Cause: 00-2-14060-1
PETITIONER.	

A. STATUS OF PETITIONER

I,Darnell McGary, apply for relief from confinement. I am not now in custody serving a sentance upon conviction of a crime, I am now in custody because of the following type of court order stipulation to civil commitment as a sexually violant predator under RCW 71.09.020

1). The court in which I was sentanced is Pierce County Superior Court.

2). Petitioner remains in custody after stipulating to civil commitment as a sexually violant predator on Febuary 5, 2004. Petitioner is convicted of three sexually violant offenses in Pierce County. Causes

88-1-01277-8, First degree Rape

88-1-01612-9 First degree Rape

88-1-01885-7 Indecent Liberties

Petitioner has been commited to the Special Commitment Center since December 15, 2000. Petitoner has participated in the Treatment Program and completed six phases. Petitioner now resides at an Less Restrictive Alternative (LRA) at the Secure Community Transition facility. Petitioner asks the court for specific performance of his stipulation, relating to diagnosis (Anti-Social Personality Disorder) Appendix A (Stipulation). And based on the forensic evaluation of Danial Yanisch for LRA consideration that Petitioner no longer meets the criteria of a sexually violant predator under RCW 71.09.060.

3. I was court order on Less Restrictive Alternative status on August 4th, 2004 and released from Total Confinement on September 7, 2004

4. The Judge who order the less restrictive alternative was RONALD CULPEPPER.

5. My lawyer's on this issue were STEPHAN STERN AND F. MCNAMARA JARDINE

6. I am on appeal of the commitment for failure of the state to plead and prove a recent overt act, and breach of plea agreement.

7. Since my conviction I have not asked the court for relief. However, during probable cause stages of the RCW 71.09 petiton I requested relief under cause no. 21578-1

8. I have no lawyer in any of the matter's I have proceeded. It is all pro-se work.

deviancy issues. The issue is to declare petitioner no longer a sexually violant predator or treat petitioner for Anti-Social Personality Disorder.

10. Today petitioner prays the court will realize that the state is doing two different things. One is confining petitioner without a disorder that the court has jurisdiction over, and that wasn't agreed upon in the stipulation. Also, there treating petitoner as a sexual deviancy case a paraphile or paraphiliac

11. See Appendix A and Appendix B for stipulation agreement and LRA consideration evaluation by Daniel Yanisch

12. The following statute's apply in petitioners case: **RCW 71.09.020, RCW 71.09.060**

If the court needs authority in this matter please advise petitioner immediately.

13. The petition is the best way I know to get relief in this instance because RAP 16.4 a,b and c apply to immediate release from confinement, conditions that relate to unconstitutional confinement and finally the basis of jurisdiciton. Petitioner is sure this is the appropiate relief.

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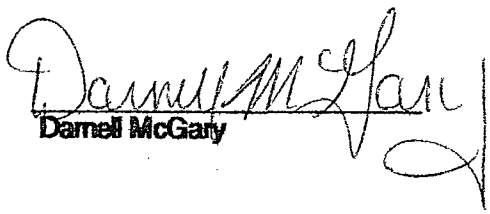
with regards to deviancy treatment.

I, Darnell McGary by and through pro-se declare under the penalty of perjury that the above is true and correct as required by law and under 28 U.S.C 1746

Dated this 20th day of October 2004



Darnell McGary

ATTACHMENT B

N THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Personal Restraint Petition of DARNELL MCGARY, Petitioner.	No. 32902-6-II ORDER DISMISSING PETITION

Darnell McGary seeks relief from personal restraint imposed following his civil commitment as a sexually violent predator. He claims that his restraint is unlawful because he no longer qualifies as a sexually violent predator and that the State is violating the commitment stipulation agreement.

On February 5, 2004, McGary stipulated that he was a sexually violent predator. He agreed that he committed three sexually violent offenses. Finding of Fact 3, Response Attachment A. He agreed that he "suffers from Schizophrenia and Antisocial Personality Disorder." Finding of Fact 4, Response Attachment A. He agreed that this personality disorder "causes him serious difficulty controlling his sexually violent behavior." Finding of Fact 5, Response Attachment A. He agreed that this "personality disorder makes him more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility." Finding of Fact 6, Response Attachment A. And he agreed that his personality disorder is a mental abnormality that qualifies him under Chapter 71.09 RCW as a sexually violent predator. Conclusion of Law 5, Response Attachment A.

As part of the agreement, the State agreed that McGary would be placed in less restrictive housing at the SCTF (Secure Community Transition Facility) as soon as he qualified and as long as he continued to comply with the LRA (Least Restrictive Alternative) order. The stipulation also allowed McGary to appeal a ruling denying his motion to dismiss the petition for the State's failure to allege a recent overt act. *See In Re Detention of McGary,* No. 31487-8-II (heard May 3, 2005).

The court's order on McGary's release to LRA shows McGary's agreement to treatment with Dr. Brian Judd, a sex offender treatment provider, to fully comply with Dr. Judd's treatment plan and treatment rules, and, amongst other things, to "[p]articipation in all treatment as deemed appropriate and necessary by my treatment providers, DSHS, CCO, and Court." Response Attachment B and Attachment B Appendix D.

Nothing before this court shows that the State is violating any part of the agreement. McGary is in sexual deviancy treatment as he agreed to. But in his reply brief, McGary asserts that his agreement was unknowing in that he simply did not understand that he could be treated for a mental abnormality that he does not have. But he presents no competent evidence that the agreement was involuntary. To the contrary, the court found that it was knowing, voluntary, and intelligent.

Secondly, petitioner argues that he no longer suffers from anti-personality disorder and this court should declare that he is no longer a sexually violent predator and order his immediate release. But this is the improper forum to seek such relief. RCW 71.09.090(2)(a) allows petitioner to seek unconditional release in superior court. He

must do so there to obtain the relief he requests. *See* RAP 16.4(d) (relief is available through a personal restraint petition only when no other adequate remedies are available).

Petitioner fails to show unlawful restraint. Accordingly, it is hereby

ORDERED that this petition is dismissed under RAP 16.11(b).

DATED this 19 day of July, 2005.

Acting Chief Judge

cc: Darnell McGary
Department Of Social & Health Services
Criminal Justice Division
County Cause No(s). 00-2-14060-1
Jennifer T. Karol
Judge Morgan

ATTACHMENT C

10-12-05

THE SUPREME COURT OF WASHINGTON

In re the Personal Restraint Petition of

DARNELL McGARY,

Petitioner.

NO. 77525-7

RULING DENYING REVIEW AND DENYING MOTION FOR RELEASE

The State petitioned to civilly commit Darnell McGary as a sexually violent predator. Mr. McGary stipulated in February 2004 that he committed sexually violent offenses, that he suffered from mental disorders that made it difficult for him to control his sexually violent behavior and rendered him likely to engage in such behavior if not confined to a secure facility, and that he qualified as a sexually violent predator under chapter 71.09 RCW. The State in turn agreed that Mr. McGary would be placed in less restrictive housing at a secure community transition facility as soon as he qualified and as long as he continued to comply with a least restrictive alternative order. The stipulation also allowed Mr. McGary to appeal the denial of his motion to dismiss the civil commitment petition for failure to allege a recent overt act. In December 2004, Mr. McGary filed a personal restraint petition directly in this court, arguing that the State violated the stipulation and that he no longer suffered from a mental disorder justifying his continued commitment. I transferred the petition to Division Two of the Court of Appeals, where the Acting Chief Judge dismissed it. Mr. McGary now seeks this court's discretionary review. RAP 16.14(c); RAP 13.5.

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The Acting Chief Judge determined that the materials Mr. McGary presented fail to show that the State violated its stipulation. The Acting Chief Judge also correctly noted that the civil commitment statute already provides a procedure for those seeking judicial release from commitment. *See* RCW 71.09.090(2)(a). Mr. McGary does not show that the Acting Chief Judge obviously or probably erred. RAP 13.5(b)(1)-(2).

Since filing his motion for discretionary review, Mr. McGary has filed a motion in this court for "release" from confinement, along with a video tape of a claimed "taser incident" in 1999 and an audio tape of an involuntary medication hearing held on an unspecified date. But Mr. McGary does not explain the relevance of these tapes, nor is his motion for "release" an appropriate remedy in connection with his motion for discretionary review. As indicated, Mr. McGary has a statutory remedy if he believes he is entitled to be released. He does not demonstrate error justifying discretionary review.

Accordingly, the motion for discretionary review and the motion for release are both denied.

COMMISSIONER

October 10, 2005

NO. 42552-1-II

WASHINGTON STATE COURT OF APPEALS, DIVISION II

In re the Detention of: DARNELL MCGARY, Appellant.	DECLARATION OF SERVICE

I, Allison Martin, declare as follows:

On May 25, 2012, I sent via electronic mail and United States mail true and correct cop(ies) of Opening Brief of the State of Washington and Declaration of Service, postage affixed, addressed as follows:

Rebecca Bouchey
Nielsen, Broman & Koch
1908 E. Madison St
Seattle, WA 98122
BoucheyR@NWattorney.net

Darnell McGary
Special Commitment Center
PO Box 88600
Steilacoom, WA 98388
Email c/o Becky Denny, Legal Coordinator at SCC:
DennyBE@dshs.wa.gov

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 25TH day of May, 2012, at Seattle, Washington.

Allison Martin
ALLISON MARTIN

WASHINGTON STATE ATTORNEY GENERAL

May 25, 2012 - 11:23 AM

Transmittal Letter

Document Uploaded: prp2-425521-Response Brief.pdf

Case Name: In re the Personal Restraint Petition of Darnell McGary

Court of Appeals Case Number: 42552-1

Is this a Personal Restraint Petition? (●) Yes ( ) No

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( ) Motion: ____

( ) Answer/Reply to Motion: ____

(●) Brief: Response

( ) Statement of Additional Authorities

( ) Cost Bill

( ) Objection to Cost Bill

( ) Affidavit

( ) Letter

( ) Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

( ) Personal Restraint Petition (PRP)

( ) Response to Personal Restraint Petition

( ) Reply to Response to Personal Restraint Petition

( ) Other: _____

Sender Name: Allison Martin - Email: **allisonm1@atg.wa.gov**

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WASHINGTON STATE ATTORNEY GENERAL

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Transmittal Letter

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Case Name: In re the Personal Restraint Petition of Darnell McGary

Court of Appeals Case Number: 42552-1

Is this a Personal Restraint Petition? (●) Yes ( ) No

The document being Filed is:

( ) Designation of Clerk's Papers [ ] Supplemental Designation of Clerk's Papers

( ) Statement of Arrangements

( ) Motion: ____

( ) Answer/Reply to Motion: ____

( ) Brief: ____

( ) Statement of Additional Authorities

( ) Cost Bill

( ) Objection to Cost Bill

( ) Affidavit

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